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82-661

Office-Supreme Court, U.S.
FILED
OCT 15 1982
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JULIUS WALKER,
Petitioner-Claimant

v.

SUN SHIP, INC.,
Respondent

Petition for Writ of Certiorari To the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED FOR REVIEW

Does an Administrative Law Judge (ALJ) have discretion under §12(d)(2) of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. §92(d)(2)] to excuse a claimant for his failure to give timely notice of injury where the ALJ finds as facts that (1) lateness was quite short, (2) the employer was not prejudiced, (3) great harm to the claimant would result otherwise, and (4) there was no fault on the part of the claimant.

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, JULIUS WALKER, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit filed July 26, 1982, which remanded the matter to the Office of Administrative Law Judges with instruction to dismiss.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Third Circuit appears at page A1 of the Appendix.

2. The Opinion and Order of the Benefits Review Board of the U.S. Department of Labor of June 15, 1981, the subject of review by the United States Court of Appeals for the Third Circuit, appears in the Appendix at page A-11.

3. The dissenting opinion of Administrative Appeals Judge Julius Miller of September 22, 1981, appears in the Appendix at page A-19.

4. The decision and Order of Administrative Law Judge Edwin S. Bernstein of September 6, 1979, appears in the Appendix at page A-26.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit denying the Petition to review the Order of the Benefits Review Board and remanding the case to the Office of Administrative Law Judges with instructions to dismiss was filed July 26, 1982. This Petition for writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

THE APPLICABLE STATUTE

This case involves the construction and interpretation of two sections of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq.

The first section involved is section 12(a), which provides:

> Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury or death and the employment. Such notice shall be given (1) to the deputy commissioner in the compensation district in which the injury occurred, and (2) to the employer.

Section 12(d)(2) of the Act provides for an exception to the notice requirement in the following language:

> Failure to give such notice shall not bar any claim under this chapter . . . (2) if the deputy commissioner [now administrative law judge] excuses such failure on the ground that for some satisfactory reason such notice could not be given. . . .

STATEMENT OF THE CASE

Julius Walker was employed by Sun Ship, Inc., for approximately thirty (30) years. During a good part of this time he worked as a "burner" and consequently was exposed to toxic vapors in closed quarters. In December of 1974, he found it necessary to leave work after inhaling paint fumes. Four days later he entered the hospital for what appeared to be pneumonia. Although he was released from the hospital twelve days later, he never returned to work.

In September of 1975, Walker made inquiries of an attorney as to whether he was entitled to Worker's Compensation for an eye injury. During the course of his inquiry, he disclosed that he was unemployed because of a lung problem.

The attorney sent him to see a lung specialist. He obtained an examination in November of 1975, at which

time the specialist told him he had a lung illness which was "attributable to his work". Claimant filed a claim with the appropriate authorities for his lung problem on February 5, 1976, but it was not until March 10, 1976 that the employer received a copy of the claim.

The case was heard by an Administrative Law Judge who held that Walker's failure to give notice of a disabling injury within thirty (30) days was not barred because the employer had knowledge of the injury. This was affirmed by the Benefits Review Board, but on appeal to the United States Court of Appeals for the Third Circuit, it was reversed on the ground that in order to render §12(d)(1) applicable, the employer had to know not only of the injury (the lung problem), but also that the claimant's job was the cause of the injury. Therefore, that Court reversed the Board's decision, since the evidence did not support a finding that the employer had knowledge that the claimant's lung problems were work-related. However, that Court remanded the case since there had been no inquiry as to whether claimant's failure to give timely notice was excusable pursuant to §12(d)(2). That case is found in *Sun Shipbuilding and Dry Dock Company v. Walker*, 590 F. 2d 73 (d Cir. 1978).

On remand, Administrative Law Judge Bernstein, noting that Congress "intended to afford Administrative Law Judges a good deal of discretion in determining excusability . . ." excused the claimant's late notice on the ground that lateness of notice must be considered in the light of four factors. Applying these factors, the ALJ found: (1) the claim was filed only 70 to 75 days beyond the thirty day requirement, (2) there was no evidence of prejudice to the employer, (3) denial of the claim would drastically penalize the claimant who was totally disabled by his lung problems, and (4) claimant was not at fault for his failure to give a timely notice.

The employer appealed the decision of the ALJ to the Benefits Review Board where a majority reversed.

Walker appealed the decision of the Benefits Review Board to the Third Circuit Court of Appeals which affirmed and directed that the claimant's claim should be dismissed.

Federal jurisdiction exists pursuant to 33 U.S.C. §921(c), which provides for a Review of Final Orders of the Benefits Review Board by the appropriate Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The decision in the instant case is legally philosophically contrary to the result reached by the Court of Appeals for the Fourth Circuit with respect to a similar factual situation.

Section 12 of the Act provides that notice of a work-related injury must be given within thirty (30) days, a short period of time. But by Section 12(d)(2) of the LHWCA Congress vested in the administrative Law Judge discretion to excuse failure to give notice. The cornerstone for the application of this provision is the discretion of the Administrative Law Judge. The decision in the instant case failed to consider whether the administrative law Judge abused his discretion in excusing notice. This decision is in error and is also contrary to the result reached by the Court of Appeals for the Fourth Circuit in a similar factual situation.

In *Bethlehem Steel Corporation vs Parker*, 163 F.2d 334 (4th Cir. 1947) the court stated:

> We think the wording of the Act, its purposes and its history, make it quite clear that the powers of the Deputy Commissioner to excuse the timeliness of notice (since distinguished from the sheer failure to give any notice whatsoever) are very broad. This power is given by the Act in wide, general terms, and can be exercised by the Deputy Commissioner

for "some satisfactory reason." Manifestly, the decision of what reasons are, and what reasons are not, satisfactory is left to the Deputy Commissioner. The Act sets out no principles, no standards, to guide the Deputy Commissioner in making a decision.

In the instant case the Administrative Law Judge has set forth a four part standard to consider if a "satisfactory reason" has been presented by a claimant in his request that notice be excused. The majority of the Benefits Review Board in considering this four part standard did not rule that the standard was unlawful or in anyway erroneous. What the majority of the Benefits Review Board did was to disagree with the Administrative Law Judge's finding that under the standard, which he, the Administrative Law Judge applied, the claimant acted without fault. This is a finding of fact by the Administrative Law Judge. It is error for the Board to disagree with an Administrative Law Judge's finding of fact when such findings of fact are supported by substantial evidence. The Board must affirm a decision if the findings of the Administrative Law Judge are supported by substantial evidence in the record considered as a whole, if the findings are rational and if the decision is in accordance with the law. *Bank v. Chicago Grain Trimmers Association*, 390 U.S. 459 (1968); *Keith v. Smith Associates*, 380 U.S. 359 (1965); *Lehry v. Brown-Pacific-Maxon, Inc.* 340 U.S. 504 (1965); *Cardillo v. Liberty Mutual Insurance Company*, 330 U.S. 469 (1974).

The decision of the Court in the instant case fails to consider this question.

II. The decision in the instant case is legally and philosophically contrary to the result reached by the Court of Appeals for the Fifth Circuit with respect to a similar factual situation.

In *Smith v. Aerojet General Shipyards, Inc.*, 647 F. 2d 518 (5th Cir. 1981), one of the defenses of the em-

ployer to a death claim filed under the Longshoremen's and Harbor Workers' Act was that the widow failed to provide the employer with timely notice of death. In that case, the Administrative Law Judge found in favor of the *employer*. In order to disturb that finding, the Court of Appeals had to, in effect, reverse an Administrative Law Judge — a rarity in this field.

Notwithstanding the finding of the Administrative Law Judge, the Fifth Circuit said that it had a mandate under the Act to apply the provisions of the Act in such fashion as to avoid "harsh and incongruous results" and not to "construe the Act so as to enable employers to escape liability for persons entitled to recover . . . by reading into [the law] technical restrictions on the tolling of the filing period which are inconsistent with the purpose of the Act."

Basing its decision on the entire record, the 5th Circuit found that the circumstances constituted "a satisfactory reason" for the failure of the widow to give the notice required by the law.

Basically the 5th Circuit found that the widow was "barely literate" and there was a complete absence of prejudice to the employer by the failure to give notice. Adding all the circumstances together, the Court concluded that the widow's claim "should not be time barred due to her failure to comply with the 30-day notice requirement."

We submit that the *Smith* case, *supra*, and the instant case are diametrically opposed.

III. The opinion of the Court in the instant case does not properly consider the *Smith* case.

The opinion of the Court in the instant case relegates a discussion of *Smith v. Aerojet General Shipyards*, *supra*, to a footnote (footnote 2). This footnote indicates the Court does not believe the case is comparable and furthermore states that the 5th Circuit "did not state

whether it found" the excuse for failure to give notice to be "within §212(d)(1) or 12(d)(2)."

We respectfully submit that it is quite clear from the opinion that the 5th Circuit is relying upon §12(d)(2) because it discusses that problem under a separate section lettered "C" with the title "Given the circumstances of this case, does the record reveal a satisfactory reason excusing Smith's widow's failure to comply with §12's 30-day notice of death requirement."

It is quite clear from the heading of the section that the Court is referring to *an excusing* of the failure to give notice. Subsection (2) of 12(d) uses the language "excuses" whereas subsection (1) uses no such language. It is quite clear from footnote 2 to the opinion in the instant case that the Court has not thoroughly analyzed the *Smith* case and did not recognize that its holding in the instant case is contrary to the holding of the Court in the *Smith* case.

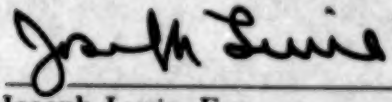
IV. The matter of deciding the instant case is an important issue of Federal Law which should be settled by this Court.

The essential issue in the instant case is what constitutes a "satisfactory reason" to be found by the Administrative Law Judge to excuse the failure of a claimant to give the thirty day notice required by the Act. Because of the short period in which notice must be given, the problem arises frequently, yet there is a dearth of reasoned judicial precedent on the subject. We respectfully submit that in the language of Rule 19 of the Rules of the United States Supreme Court, the issue is "an important question of Federal Law which has not been, but should be, settled by this Court . . ."

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,



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